Mawar Biru Sdn Bhd v Lim Kai Chew and another application

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NOS 24-676 AND 677 OF 1989
ABU MANSOR J
23 JUNE 1990

Land Law — Caveat — Removal of — Whether a mere chose in action arising out of or incident to a contract for the sale of land entitles caveator to lodge a caveat — Whether there is any serious question to be tried when agreement had expired and breach caused by caveator

Land Law — Second caveat — First caveat removed by registrar pursuant to s 326(3) of the National Land Code 1965 — Second caveat removed based on applicant's claim that finalization of the sale agreement, adjudication and stamping and registration of the transfer upon completion of sale are pending

The applicant who is the buyer and the respondent who is the seller had signed agreements of sale and purchase of a piece of land consisting of the principal agreement, second principal agreement, the first supplementary agreement and the second supplementary agreement. The applicant subsequently caveated the said land. On 25 April 1988 the caveatee gave notice to the caveator to complete the purchase within one month from the date of the letter, stating that time is to be taken as the essence. The applicant failed to complete the purchase and requested a further extension of time of four months to complete the purchase. The respondent then stipulated that conditional upon interest being paid forthwith, he agreed to allow extension but the applicant did not accept the respondent's conditional offer. Subsequently, the registrar removed the caveat pursuant to s 326(3) of the National Land Code 1965. On 27 July 1989 the applicant entered a second caveat, claiming that finalization of the sale and purchase agreement, adjudication and stamping and registration of the transfer upon completion of sale were pending. On 1 August 1989 the applicant attempted to have the written third supplementary agreement signed by the respondent but the agreement was returned to the applicant as the respondent refused to sign it. Following from this refusal of the respondent, the applicant had entered a caveat and filed a writ for declaration. The issue before the court was whether the caveats should be removed.

Held, allowing the applications :

(1) The applicant's claim does not raise serious questions to be tried as defined by Lord Diplock in *Eng Mee Yong & Ors* v *Letchumanan*[1] where the learned Law Lord said if the evidence before the High Court appears to be in conflict then that evidence is not to be disposed of on affidavit evidence only. If there is such a conflict that leaves a serious question to be tried.

(2) The applicant's attempt to have the written third supplementary agreement signed by the respondent was not consistent with 'pending the finalization of the sale and purchase agreement' and what had been stated in Form 19B. A mere chose in action arising out of or incidental to a contract for the sale of the land cannot entitle the claimant to enter a caveat willy nilly to freeze land until his action has been heard. There must be interest in the land.

(3) The applicant's intention is crystal clear, ie to keep alive a claim when the agreement for the sale of land had expired and the breach was caused by the failure of the applicant to complete. There was also failure of the applicant to disclose all material facts when obtaining the order for extension of the caveat.

[Bahasa Malaysia summary

Pemohon (pembeli) dan responden (penjual) telah menandatangani perjanjian jual beli sebidang tanah yang terdiri daripada perjanjian utama, perjanjian utama kedua, perjanjian tambahan dan perjanjian tambahan kedua. Pemohon kemudian mengkaveatkan tanah itu. Pada 25 April 1988, penanggung kaveat memberi notis kepada pengkaveat menyuruh pengkaveat menyelesaikan pembelian itu dalam masa satu bulan dari tarikh surat itu, dan menyatakan bahawa masa menjadi asas. Pembelian tidak diselesaikan oleh pemohon dan ia meminta masa dilanjutkan selama empat bulan. Responden bersetuju tetapi dengan syarat bahawa bunga wang dibayar degan segera. Pemohon tidak menerima tawaran ini. Pendaftar, kemudiannya, menyingkirkan kaveat itu di bawah s 326(3) Kanun Tanah Negara 1965. Pada 27 Julai 1989, pemohon memasukkan kaveat kedua dan menyatakan bahawa penyelesaian pembelian belum diputuskan. Pada 1 Ogos pemohon telah berusaha menyuruh responden menandatangani perjanjian tambahan ketiga tetapi responden enggan berbuat demikian dan mengembalikan perjanjian itu. Berikutan dengan keengganan responden, pemohon memasukkan satu lagi kaveat dan memfailkan writ perisytiharan. Isu di hadapan mahkamah ialah sama ada kaveat-kaveat itu harus disingkirkan.

Diputuskan, membenarkan permohonan itu:

(1) Tuntutan sipemohon tidak menimbulkan soal-soal yang penting yang harus dibicarakan sepertimana yang diterangkan oleh Lord Diplock dalam *Eng Mee Yong & Ors* v *Letchumanan*,[1] iaitu kalau keterangan di hadapan Mahkamah Tinggi kelihatan bertentangan, keterangan itu tidak seharusnya diselesaikan berasas kepada keterangan afidavit sahaja. Jikalau ada pertentangan, ini bermakna ada soal yang penting yang harus dibicarakan.

(2) Usaha sipemohon untuk mendapatkan tandatangan responden pada perjanjian tambahan yang ketiga tidak selaras dengan 'sementara menunggu penyelesaian perjanjian jual beli' ('pending the finalization of the sale and purchase agreement') dan apa yang telah dinyatakan dalam Form 19B. Hak dalam tindakan sahaja yang timbul daripada atau beriringan dengan kontrak penjualan tanah tidak memberi hak kepada pihak pemohon menuntut memasukkan kaveat dengan sesuka hati, untuk membekukan tanah sehingga tuntutannya dibicarakan. Kepentingan dalam tanah mesti ada.

(3) Tujuan sipemohon adalah terang, iaitu ia ingin tuntutannya terus hidup apabila perjanjian itu tidak ada lagi, dan mungkin itu disebabkan oleh kegagalan sipemohon untuk menyelesaikan penjualan itu. Sipemohon juga gagal untuk memberitahu semua fakta-fakta penting apabila ia mendapat perintah untuk melanjutkan kaveat itu.]

[*Editorial Note*: The caveator/applicant has appealed to the Supreme Court vide Civil Appeal Nos 03-73-1990 and 03-74-1990. The learned judge had granted a stay of his order pending the hearing of the appeals.]

Cases referred to

1 *Eng Mee Yong & Ors* v *Letchumanan* [1979] 2 MLJ 212 (folld)
2 *Million Group Credit Sdn Bhd* v *Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 (folld)

Wong Kim Fatt (*Rosita Yeo (Miss)* with him) for the applicant.
Arthur Lee for the respondents.

Cur Adv Vult

Abu Mansor J: On 17 January 1990 I ordered that the matters of the removal of private caveat in OS 676 of 1989 and in OS 677 of 1989 be consolidated and heard together as the caveator/applicant in each originating summons is one and the same person and common questions of law would arise. At the same time in OS 676 of 1989 Lim Kai Chew (respondent/caveatee) the registered owner of land held under Geran No 25343, lot 3787 situated in the mukim of Tebrau ('the said land') was ordered to be made a respondent by me. I also ordered on that date that Ting Yuk Kiong, the registered owner of land lot 3786 Grant 25342 in the mukim of Tebrau in OS 677 of 1989 be made respondent therein. As for the rest of the prayers in the summons-in-chambers filed by the respondent in OS 677 of 1989 I ordered that they be argued in open court on 24 February 1990. On this date the parties' counsel agreed to give written submissions. I then reserved the matters to a date to be fixed for judgment.

These matters arose as follows. In both OS 676 and 677 of 1989 Mr Wong Kim Fatt appeared for the applicant caveator. On the application of both applicants I ordered on 2 October 1989 that the private caveats entered by the applicant in respect of each land be extended until further order with liberty to the registered owner to apply to set it aside. As already stated by the respective respondents' summons-in-chambers dated 25 November 1989 each respondent applied that the court's order dated 2 October 1989 be set aside and the private caveat in respect of each land be removed.

On 24 February 1990 when matters came before me in open court it was agreed by parties that counsel for the applicant, Mr Wong Kim Fatt, put in a written submission as it is already settled law that onus is on the caveator to prove that the caveats in both cases remain and Mr Arthur Lee was to give a reply. The parties have also agreed that my decision in OS 676 of 1989 will apply to OS 677 of 1989.

Mr Wong in a long and comprehensive submission posed the question for the decision of this court whether or not the caveats entered by the applicant should be removed. To answer that question the court must ask:

(a) whether the applicant's claim does raise a serious question to be tried; and
(b) whether on a balance of convenience it would be just to maintain the status quo until the trial of the action by not removing the caveat. Applicant's counsel cited *Eng Mee Yong & Ors* v *V Letchumanan.*[1]

In para 13 of the applicant's submission counsel submitted that the applicant's solicitors vide letter dated 1 August 1989 wrote to M/s Arthur Lee for the respondents: 'we are informed by our client, Mr Harry Lee, that he has been in contact with your client ... We are further instructed that parties have come to an agreement to finalize the sale as per the terms set out in the agreement enclosed herein.'

The applicant's solicitors enclosed all copies of that agreement for the respondent to sign but the respondent refused to do so. The court notes that whatever is the value and authenticity of the earlier agreements, it is common ground that before this alleged oral agreement, the applicant and the caveatee had signed the principal agreement, second principal agreement, the first supplementary agreement and the second supplementary agreement.

As a result of that letter dated 1 August 1989 M/s Arthur Lee, Yap & Netto returned the third supplementary agreement by the applicant's solicitors as the caveatee had refused to execute it. Following from this refusal of the respondent to execute the applicant has lodged a caveat and filed a writ for declaration.

I find there is merit in the argument of the respondent that the applicant's claim does not raise serious questions to be tried as defined by Lord Diplock in *Eng Mee Yong & Ors* v *V Letchumanan*[1] where the learned Law Lord said if the evidence before the High Court appears to be in conflict then that evidence is not to be disposed of on affidavit evidence only. If there is such a conflict that leaves a serious question to be tried.

I hold that the applicant has not satisfactorily proved to me that there are serious questions to be tried as set out by submission from pp 17-20 the most important of which are whether there was in fact an oral agreement varying the principal agreement and taking into account the antecedent and subsequent conduct of the parties it could not lead me to such a finding.

The applicant's attempt to have the written third supplementary agreement signed by the respondent was not consistent with 'pending the finalization of the sale and purchase agreement' and what had been stated in Form 19B. I agree with the authority in *Million Group Credit Sdn Bhd* v *Lee Shoo Khoon & Ors*[2] where Shankar J said : 'A mere chose in action arising out of or incidental to a contract for the sale of the land cannot, ..., entitle the claimant to lodge a caveat willy nilly to freeze land until his action has been heard'. There must be interest in land.

The above position can clearly be seen from the sequence of events on those dates as enumerated by the solicitors for the respondent in p 7 of his written submission as follows:

25 April 1988:	Caveatee gives notice to the caveator to complete the purchase within one (1) month from the date of the letter, stating that time is to be taken as of the essence.
25 May 1988:	Caveator fails, neglects and/or refuses to complete the purchase.

Requests for a further extension of time of four (4) months to complete the purchase.

15 June 1988: Caveatee stipulates clearly that conditional upon interest being paid forthwith, caveatee agrees to allow extension but caveator did not accept caveatee's conditional offer.

08 January 1989: Pursuant to s 326(3) of the Code registrar removes the first caveat entered against caveatee, Ting Yuk Kiong's said land.

15 March 1989: Caveator's solicitors write to caveatee's solicitors stating that the parties are negotiating that week-end 'in respect of interest for late payment and shall be finalizing the above sale and purchase in due course'. Nothing transpired therefrom.

27 May 1989: Pursuant to s 326(3) of the Code registrar removes the first caveat entered against caveatee, Lim Kai Chew's said land.

27 July 1989: Caveator enters caveat. Application is based on its claim that finalization of the sale and purchase agreement, adjudication and stamping and thereafter registration of the transfer upon completion of sale is pending.

I find as facts the caveator's breach in the sequence of events. When the second caveat was entered I rule there is therefore no good reason for its entry. The applicant's intention is crystal clear to keep alive a claim when the agreement for the sale of land had expired and the breach was caused by the failure of the applicant to complete. By this I also find there was failure of the applicant to disclose all material facts when obtaining the order for extension of the caveat. I find it is also unnecessary for me to go into other issues. I rule the caveatee has succeeded in his application in both cases. I allow the caveatee's application and I hereby set aside the order I made on 2 October 1989 and I also hereby order accordingly that the caveats entered in respect of each land be removed with costs to the respondent caveatee to be taxed.

Applications allowed.

Solicitors: *Yeo & Co*; *Arthur Lee & Co.*

Reported by *Zarinah Marican*